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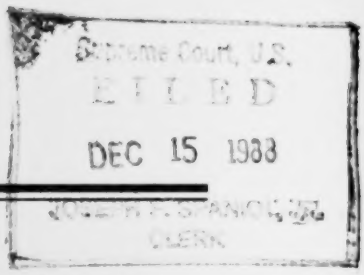

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The federal statute of limitations generally applicable to non-capital criminal offenses, 18 U.S.C. § 3282, provides that "no person *shall* be prosecuted, tried or punished . . . unless indictment is found . . . within five years next after such offense shall have been committed." (Emphasis added.) This facially absolute proscription on the prosecution of offenses more than five years after their commission was qualified by Congress with introductory language providing for relaxation of the proscription where "expressly provided by law . . . ." In the complete absence of any express provision of law authorizing the practice, federal prosecutors and the targets of federal criminal investigations have entered extra-judicial arrangements which, as in this case, essentially annul the five-year limitation by providing for suspension of that limitation for either a determinate or an unspecified, unlimited amount of time. Two federal courts of appeals have taken the position that federal criminal statutes of limitations do not authorize such bi-lateral arrangements. The court below disagreed. This case presents the following questions:

1. Whether § 3282 may be annulled by a bi-lateral arrangement between the Government and the target of a federal criminal investigation in the absence of any statute providing for such arrangements as exceptions to § 3282's otherwise mandatory bar on the prosecution of federal crimes more than five years after their commission.

2. Whether, if this Court were to hold that § 3282 may be construed to tolerate some forms of arrangements between federal prosecutors and targets of

criminal investigations to nullify its five-year limitation, that statute authorizes the permanent nullification of its five-year limitation in the complete absence of any showing by the Government that such permanent nullification is required in order to achieve a valid governmental objective.

3. If this Court were to hold that § 3282 may be construed to tolerate bi-lateral arrangements to toll the statute of limitations for determinate or indeterminate periods, under what circumstances will such arrangements be held valid.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
A. The Question Whether § 3282 May Be Annulled by a Bi-lateral Arrangement between the Government and the Target of a Criminal Investigation Is an Important, Recurring Question upon Which the Courts of Appeals are Divided	9
1. *The Question is Important and the Decision Below is Erroneous*	9
2. *The Practice in Question is Widespread*	18
3. *There is an Inter-circuit Conflict on This Issue*	19
B. The Questions Whether and Under What Circumstances a Bi-lateral Arrangement to Suspend the Statute of Limitations Indefinitely or for a Finite Period of Time Is Authorized Are Important Questions upon which the Courts of Appeals are Divided and upon which this Court's Decision is Needed	23
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Page
Adams v. *Woods*, 6 U.S. (2 Cranch) 335 (1805)	25
Benes v. *United States*, 276 F.2d 99 (6th Cir. 1960)	18,21,22
Duncan v. *Louisiana*, 391 U.S. 145 (1968)	7
Jaben v. *United States*, 381 U.S. 214 (1965)	10
Streep v. *United States*, 160 U.S. 128 (1895)	14
United States v. *Akmakjian*, 647 F.2d 12 (9th Cir. 1981)	*passim*
United States v. *Del Percio*, 657 F. Supp. 849 (W.D. Mich. 1987), *appeal pending*, No. 87-1396 (6th Cir.)	*passim*
United States v. *Dickie*, 775 F.2d 607 (5th Cir. 1985)	17
United States v. *Gallup*, 812 F.2d 1271 (10th Cir. 1987)	20
United States v. *Gonsalves*, 675 F.2d 1050 (9th Cir. 1982)	14
United States v. *Harris*, 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (1956)	13
United States v. *Levine*, 658 F.2d 113 (3d Cir. 1981)	19
United States v. *Marion*, 404 U.S. 307 (1971)	7,24,28
United States v. *Meeker*, 701 F.2d 685 (7th Cir.), *cert. denied*, 464 U.S. 826 (1983)	18-19,27
United States v. *Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1592 (1988)	14
United States v. *Peloquin*, 810 F.2d 911 (9th Cir. 1987)	*passim*
United States v. *Ray*, 768 F.2d 991 (8th Cir. 1985)	17
United States v. *Sindona*, 473 F. Supp. 764 (S.D.N.Y. 1979)	19,27

Table of Authorities Continued

Page

United States v. *Wild*, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977) 19,26,27

Waters v. *United States*, 328 F.2d 739 (10th Cir. 1964) ..... *passim*

FEDERAL CONSTITUTION AND STATUTES:

CONSTITUTION:

Art. I, § 7 18

Fifth Amendment (Due Process Clause) 7,24

Sixth Amendment (Speedy Trial Clause) 24

STATUTES:

18 U.S.C. § 3161 *et seq* 16

18 U.S.C. § 3161(h)(2) 17

18 U.S.C. § 3161(h)(8)(A) 17

18 U.S.C. § 3231 2

18 U.S.C. § 3282 ..... *passim*

18 U.S.C. § 3290 9,14

18 U.S.C. § 3292 10,14,25,26

18 U.S.C. § 3731 2

26 U.S.C. § 6531 10,11,15,19

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255 11

MISCELLANEOUS:

Title 9, United States Attorney's Manual, 9-18.401 8

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The Department of Justice has historically and publicly embraced the proposition that criminal statutes of limitations serve important public purposes, including the expedition of the discovery and investigation of crime and the devotion of scarce law enforcement resources to recent crimes. The Government is equally committed, at least in this Court, to the proposition that the plain language of a statute enacted by Congress should be given its full due by the courts. Yet the Government argued below, successfully, that the important public policies embodied in 18 U.S.C. § 3282, the federal criminal statute of limitations, could be brushed aside permanently (or temporarily) by an arrangement between it and the target of a grand jury investigation to suspend for all time (or for a determinate period) the running of the five-year limitations period established by § 3282. Simply stated, the Government and the target, acting together, may annul § 3282 in any particular case for any reason or, indeed, for no reason at all. Two Courts of Appeals have held that statutes of

limitations may not be discarded in this fashion. The Courts of Appeals that have sanctioned this practice, including the court below, are in disarray regarding the circumstances under which such arrangements will be upheld. Only this Court can resolve these conflicts regarding the lawfulness of a long-standing, unsupervised practice that, by the Government's own admission below, is widespread.

OPINIONS BELOW

The opinion issued by the Ninth Circuit on October 20, 1988 is reported at 859 F.2d 805 and is reprinted in App. A, *infra*, 1a-7a. In dismissing the indictment against petitioner, the District Court issued no opinion. That court did, however, articulate its reasoning for doing so at a hearing on petitioner's motion to dismiss the indictment; the full text of that oral "opinion" is reprinted in App. B, *infra*, 8a-13a.

JURISDICTION

Jurisdiction over this case in the District Court was conferred by 18 U.S.C. § 3231. The Ninth Circuit's jurisdiction over the Government's appeal was pursuant to 18 U.S.C. § 3731. This Court's jurisdiction over this case is conferred by 28 U.S.C. § 1254(1). This petition is being filed within sixty days of the decision of the Court of Appeals.[1]

STATUTE INVOLVED

Section 3282 of Title 18, *United States Code*, reads as follows:

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[1] After the decision below was rendered, petitioner sought, and the Government did not oppose, a stay of the mandate in connection with the filing of this petition. The Ninth Circuit granted a stay of its mandate on November 22, 1988.

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

In May 1982, the Comptroller of the Currency referred to the United States Attorney for the Central District of California for investigation facts arising out of transactions of the Western National Bank, of which petitioner was the Chairman. Between 1983 and 1985, the Government's investigation was relatively dormant. Prosecution of certain of the transactions under investigation would have begun to be barred by § 3282, the applicable statute of limitations, as early as May 1986.

In February 1986, the Assistant United States Attorney ("AUSA") in charge of the investigation contacted petitioner's counsel and advised counsel of her intent to complete the investigation and present petitioner's case to the grand jury before the summer of 1986. Petitioner's counsel requested the opportunity to present exculpatory evidence and to dissuade the Government from proceeding with its case against petitioner. In May 1986, the AUSA informed petitioner's counsel that she would seek petitioner's indictment approximately one week hence. Faced with imminent indictment, petitioner executed in writing a document extending the statute of limitations on one potential charge until September 30, 1986 in order to afford his counsel time to have the pre-in-

dictment conference that had been requested several months earlier.

In June 1986 as the statute of limitations was about to expire on several other potential charges, the AUSA and petitioner executed a second letter in order to be able to continue pre-indictment conferences. This second arrangement appeared to contain the same September 30, 1986 termination date. In September 1986, and due in part to ambiguity in the second letter regarding the termination date of that arrangement, the AUSA and petitioner executed a third letter which superseded the initial letters. That third arrangement was totally open-ended as to termination, constituting what the District Court later found to be "without question an indefinite waiver of the statute of limitations for all time." App. B, *infra*, 9a. The District Court attributed the open-ended nature of this third arrangement to the Government and petitioner. Among other things, this open-ended arrangement was said by the District Court to have solved the AUSA's calendar problems occasioned by her commitments to other cases. App. B, *infra*, 12a.[2]

On September 9, 1987, petitioner was indicted for offenses that had occurred over six years prior to

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[2] One of those "other" cases was a scheduled three-week trial of the President of Western National Bank arising out of the same investigation. In October 1986, that official was convicted. Stripped of his Fifth Amendment right against self-incrimination by that conviction, that official was then called to testify before the grand jury that was continuing its investigation of petitioner. This circumstance led the District Court to find that the third arrangement enabled the Government to "better its position" against petitioner. App. B, *infra*, 12a.

indictment. Represented by new counsel, petitioner moved to dismiss the indictment as barred by § 3282. The Government defended, arguing that whatever "rights" petitioner had under § 3282 had been knowingly and voluntarily "waived" by him. After receiving oral and written testimony and briefing over the course of two hearings, the District Court dismissed the indictment.

In dismissing the indictment, the District Court apparently believed itself bound by certain Ninth Circuit cases cited by the Government as indicating that § 3282 permitted at least some arrangements under which the Government and targets of criminal investigations could suspend that statute's five-year limitations period. That court, therefore, focused on the facts before it, especially the indefinite, open-ended nature of the third arrangement. The court found that the Government had made no showing of any circumstances requiring an open-ended arrangement, as opposed to one with a fixed date. App. B, *infra*, 10a. The court observed that, "[t]here was no real discussion [between counsel for petitioner and the AUSA] for 6 or 7 months after the indefinite waiver was executed." App. B, *infra*, 12a. The court went on to observe: "There was no indictment for a period of 13 months [after execution of the third letter]. As I say, it could have been 13 years; and we would be basically in the same position." *Id.* The District Court concluded that an "indefinite waiver of the statute of limiations under the circumstances presented here was unreasonable." App. B, *infra*, 13a.

On appeal, the Ninth Circuit started with the proposition, as had been embraced by the Government before the District Court, that under Ninth Circuit

precedent[3] defendants could "waive" their "rights" under a criminal statute of limitations. App. A, *infra*, 1a. The court below made no attempt to explain what the introductory clause of § 3282—"[e]xcept as otherwise expressly provided by law"—might mean, contenting itself with the unreasoned observation that if those words, as argued by petitioner, meant what they said, then the existing "rule in this circuit that the statute of limitations . . . can be waived in some circumstances . . . would be called into question." App. A, *infra*, 4a.

The Ninth Circuit, therefore, viewed this case as involving essentially the question whether petitioner's "waiver" was knowing and voluntary and, if so, whether the Government, as a matter of "policy," should be required to demonstrate "extraordinary circumstances" in order to justify a bi-lateral, open-ended arrangement such as the one involved here.[4] So view-

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[3] *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981).

[4] The reference by the Court of Appeals to "extraordinary circumstances" related to a passage from the District Court's oral "opinion" in which the latter court had expressed the view that the Government had not shown any "extraordinary circumstances which would have required an indefinite waiver, such as a witness that could not be found and had to be located and some of the exceptional things that one might think of." App. B, *infra*, 10a. Taken in context, it is clear that the District Court did not intend to impose an "extraordinary" burden on the Government to justify an open-ended arrangement. Rather, that court, after extensive briefing and argument, concluded that the Government had offered absolutely *no* justification for the open-ended arrangement in this case after the court had repeatedly invited the Government to do so. The Government's position before the District Court, fairly characterized, was that

ing the issues before it, that court concluded that no meaningful distinctions could be drawn between open-ended and fixed-term arrangements to displace § 3282. The court found "neither remarkable nor troubling" that during the limitless period of time provided to it under the third arrangement, the Government "improved its case" and "resolved [its] calendar conflicts." Instead, the court stated that in its view, defendants in petitioner's position had the burden of demonstrating that their indictments had been "unnecessarily delayed after the waiver,"[5] or that "the prosecution acted in bad faith in agreeing to the waiver."[6] App. A, *infra*, 6a.

REASONS FOR GRANTING THE WRIT

Criminal statutes of limitations, no less than the values reflected in constitutional provisions that regulate the conduct of criminal proceedings, "reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968). The broad and

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it was not required to offer any justification for the open-ended nature of the arrangement.

[5] The court below did not explain how a defendant might demonstrate that an indictment had been "unnecessarily delayed" in the context of an open-ended arrangement which, by its very terms, contemplated the possibility of indictment ten or twenty years hence. The court below appeared to hold that such pre-indictment delay could be demonstrated on a showing less than would support the finding of a violation of the Due Process Clause of the Fifth Amendment as suggested in this Court's decision in *United States* v. *Marion*, 404 U.S. 307, 324 (1971).

[6] The court did not clarify what conduct might constitute "bad faith" in this context or whether, for example, its test would involve subjective or objective "bad faith." *See* note 16, *infra*.

important purposes of criminal statutes of limitations have been well put:

> The primary reasons for restrictions of time revolve around accepted notions that prompt investigation and prosecution insures that conviction or acquittal is a reliable result and not the product of faded memory or unavailable evidence; that time limitations may serve to encourage law enforcement authorities to expedite their investigation and discovery of crimes; that with certain exceptions involving particularly heinous offenses or offenses which are secretive in nature and thus difficult to discover, ancient wrongs should not be resurrected; and that community security and economy in the allocation of enforcement resources require that most effort be concentrated on recent crimes.

Title 9, United States Attorneys' Manual, 9-18.401 (citation omitted). The position of the Government below was that these important *public* purposes, which eclipse any concepts of the "rights" of either a target or a federal prosecutor to delay the return of an otherwise legitimate indictment or a prosecutor to continue an unjustified investigation, could be nullified by a bi-lateral arrangement between the Government and a target of an investigation.

These purposes of criminal statutes of limitations are not drawn from thin air. If they were, then such bi-lateral arrangements might be of no immediate concern to this Court. They are, instead, given life by the plain language of § 3282, under which indictments "shall" not be obtained after the passage of five years

"[e]xcept as otherwise authorized by law." In this case, the Ninth Circuit, guided or bound by its own precedent, has transformed the word "shall" to the permissive and has obliterated the introductory clause of § 3282 from that section of the *United States Code*. There is no warrant for this emasculation of the will of Congress as expressed in the unambiguous language of § 3282, the issue is a frequently recurring one, and the Courts of Appeals are divided on the questions whether and under what circumstances such repeals of § 3282 are lawful. All of these considerations warrant this Court's consideration of the lawfulness of this practice in this case.

A. The Question Whether § 3282 May Be Annulled by a Bi-lateral Arrangement between the Government and the Target of a Criminal Investigation Is an Important, Recurring Question upon Which the Courts of Appeals Are Divided

1. *The Question Is Important and the Decision Below Is Erroneous*

The rewriting of a federal statute by a federal court of appeals, especially a statute that embodies rules central to the administration of the criminal justice system, presents an important question. When Congress, cognizant of the "exceptions" clause it enacted to qualify the remainder of § 3282, has determined to create an exception to the otherwise mandatory language of that statute, it has done so by engaging in the full legislative process contemplated by the Constitution. Thus, Congress has expressly provided that no statute of limitations applies to a person fleeing from justice, 18 U.S.C. § 3290, and that the running of the statute of limitations may be suspended by a court upon application by the Government if evidence of an offense is shown to be located

in a foreign country, 18 U.S.C. § 3292.[7] Congress has never legislated an exception under which the Government and the target of a criminal investigation may, by an extra-judicial, bi-lateral arrangement between them, suspend the running of § 3282 for a determinate period, let alone forever.

In deciding this case, the court below relied upon its prior decision in *United States* v. *Akmakjian*, 647 F.2d 12 (9th Cir. 1981). That case involved another statute of limitations, 26 U.S.C. § 6531,[8] in the con-

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[7] Congress's evident concern that exceptions to the mandatory proscription of § 3282 be carefully constructed and supervised is exhibited by the elaborate scheme established in § 3292, as reprinted in App. C, *infra*, 14a. In sharp contrast to the "exception" recognized by the court below, Congress, in § 3292, provided for tight judicial supervision over suspensions of the statute of limitations and specifically prescribed limits on the time such suspensions might be allowed to run

[8] Section 6531 provides a six-year statute of limitations for offenses against the revenue laws. It is illustrative of the fact that when Congress desires to provide exceptions to a criminal statute of limitations, Congress knows quite well how to do so. Under § 6531, the six-year limitations period is expressly tolled for nine months if, within the six-year period, a complaint is instituted. An indictment returned during such a nine-month extension is not time-barred. Significantly, in *Jaben* v. *United States*, 381 U.S. 214 (1965), the Court interpreted this exception strictly, rejecting a contention by the Government that the exception could be construed "to grant the Government greater time in which to make its case . . . ." *Id.*, at 219. In contrast, under the decision below the Government—in the absence of *any* pertinent statutory exception—may be granted years or decades to better its case so long as a target faced with imminent indictment "agrees." Furthermore, the target has no apparent means, pre- or post-trial, to test whether the Government actually had evidence sufficient to obtain an indictment at the time such an arrangement was entered.

text of a collateral attack on his conviction after entry of a guilty plea by a federal prisoner pursuant to 28 U.S.C. § 2255. The Ninth Circuit agreed with the prisoner's position on the merits—that an express statutory exception to the six-year statute of limitations in § 6531 was not available to the Government on the facts of that case and that, therefore, his prosecution had been time-barred. The court went on, however, to characterize that statute of limitations as being "non-jurisdictional" and to hold it was an "affirmative defense that is waived unless raised at trial." 647 F.2d, at 14. On the basis of this slender reed, the Ninth Circuit has rewritten the plain language of § 3282 in a case in which a challenge to an actual extension of the five-year limit was raised in a pre-trial motion to dismiss an indictment as barred by § 3282.

The Ninth Circuit's reliance on *Akmakjian* to dispose of petitioner's pre-trial challenge to an indictment based upon the undoubted expiration of § 3282's five-year limitation displays a confusion, perpetuated by the Government in its briefs below and by the Government in other similar cases, *see* note 15, *infra*, between whether a bi-lateral arrangement to annul § 3282 is enforceable over the defendant's pre-trial objection, and whether, after trial or entry of a guilty plea, a convicted person may raise the statute of limitations for the first time on direct appeal or in collateral proceedings to upset an otherwise valid conviction. The latter situations, however, quite plainly involve considerations of judicial economy and the finality of judgments that are not present in this case or in any case involving the type of arrangement at

issue, at least where such an arrangement is subsequently challenged in a pre-trial motion to dismiss.

More importantly, the raising of the statute of limitations as a defense to a conviction either after trial or the entry of a guilty plea is fundamentally different from the situation presented by a conscious, pre-indictment extension of the statute of limitations. Where the statute of limitations is raised as a defense after conviction, it is not *extended* in any meaningful sense. In the context of a plea bargain, this situation occurs when the defendant decides to plead to a lesser charge that would otherwise be time-barred in return for the Government's agreement not to indict or take the defendant to trial on more serious charges that are not time-barred. Such an agreement does not even resemble the extension at issue in this case, nor does it implicate, let alone undermine, the policies embodied in § 3282.

Likewise where a defendant has gone to trial and subsequently injected the statute of limitations as a defense on appeal after conviction, there has not been even an arguable extension of the statute of limitations and, therefore, there cannot be an abrogation of the language or policies of § 3282 whether or not that defense is entertained on appeal. In short, cases such as *Akmakjian* are analytically irrelevant to a determination of the issues in this case because they do not turn on the question whether Congress has authorized the important public policy of speedy, efficient justice reflected in § 3282 to be susperseded by the Government and a defendant acting together.

In the court below, the Government framed the question in this case as whether petitioner knowingly and voluntarily entered the challenged arrangement.

Thus, in its opening brief the Government neither acknowledged that the issue in this case is whether § 3282 may be construed to authorize such bi-lateral arrangements nor suggested what the word "shall" and the clause "[e]xcept as otherwise authorized by law" might mean in this context. Rather, the Government's brief was devoted primarily to a discussion of many cases in which various federal courts have struggled with and reached conflicting results regarding the question whether criminal statutes of limitations may be asserted for the first time post-trial to invalidate otherwise valid convictions.[9] In its reply brief in this case below, the Government devoted exactly one paragraph to the question what § 3282's language might mean, advancing the curious theory that the clause "[e]xcept as otherwise expressly provided by law" should be understood solely as indicating that unless there were a statute of limitations more narrowly tailored to the particular offense charged, § 3282 applied. The court below did not adopt this cryptic speculation of the Government as

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[9] In those cases, as illustrated by *Akmakjian*, *supra*, the courts have resorted to use of the terms "jurisdictional" and "non-jurisdictional" as short-hand characterizations of the results they reach. If a statute of limitations is viewed as "jurisdictional" in the sense that its expiration deprives a trial court of jurisdiction over the case *ab initio*, there is a jurisdictional defect in the conviction that cannot be "waived" under the familiar principle that litigants cannot, by their actions, confer jurisdiction on a federal court which it otherwise does not have. *See, e.g., United States* v. *Harris*, 133 F.Supp. 796 (W.D. Mo. 1955), *aff'd on other grounds*, 237 F.2d 274 (8th Cir. 1956). If, on the other hand, a criminal statue of limitations is "non-jurisdictional," then the court's jurisdiction to enter a judgment of conviction is not drawn into question and the usual considerations governing the finality of judgments and judicial economy come into play.

to what the exceptions clause might mean, presumably because the Ninth Circuit has made clear in other recent cases that the exceptions clause has reference to statutes providing for suspension of § 3282.[10] Because the exceptions clause so clearly embraces such "suspension" statutes and given the absence of any "suspension" statute authorizing arrangements to suspend § 3282 like the one at issue in this case, the Government's reluctance to join issue on the merits of this practice is understandable.

When the Ninth Circuit itself has had occasion to interpret the exceptions clause of § 3282 outside the context of post-conviction attempts to overturn convictions, it has reached the result urged by petitioner utilizing the analysis offered by petitioner. In *United States* v. *Peloquin*, 810 F.2d 911 (9th Cir. 1987), the initial indictments of the defendants were returned within the five-year limit but were subsequently dismissed on Speedy Trial Act grounds. The Government argued to the Ninth Circuit that the return of the original indictments should be viewed as suspending

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[10] It is not surprising that the court below did not base its decision on the Government's off-hand response to petitioner's primary submission on this issue. As early as 1895, this Court assumed the predecessor of 18 U.S.C. § 3290, which suspends the running of a statute of limitations for a fugitive from justice, to be an exception to the predecessor of § 3282. *See Streep* v. *United States*, 160 U.S. 128, 133 (1895). As recently as 1987 the Ninth Circuit has made clear that the "exceptions" clause in § 3282 has to do with laws, such as 18 U.S.C. § 3292, providing for the suspension of § 3282's limitation period. *See United States* v. *Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1592 (1988). *See also United States* v. *Gonsalves*, 675 F.2d 1050, 1052 (9th. Cir. 1982) (18 U.S.C. § 3290 constitutes "exception" to 18 U.S.C. § 3282).

§ 3282 and that, consequently, the second (identical) indictments should not be regarded as barred because returned two days after the dismissal of the first indictments, the total "elapsed" time being under five years. Then Judge Kennedy, writing for that court, rejected the Government's argument:

> No . . . explicit language in 18 U.S.C. § 3282 provides that the filing of an indictment suspends the statute. Since Congress has chosen, on occasion, to make explicit the suspension of limitation periods, yet chose not to do so in this instance, we cannot infer that the filing of an indictment suspends section 3282.

810 F.2d, at 913. Applying Judge Kennedy's analysis to this case, there is absolutely no evidence, so far as petitioner is aware, that Congress has ever considered the wisdom or ramifications of the system unilaterally installed by the Government under which § 3282 (and presumably other criminal statutes of limitations such as 26 U.S.C. § 6531, discussed in note 8, *supra*) may be, for all practical purposes, repealed with the purported "consent" of the targets of criminal investigations. What is certain is that Congress has never authorized such a system by exercising its legislative power as seemingly required by the plain language of § 3282.

Peloquin is also relevant in a broader sense. In that case, the Ninth Circuit rejected the Government's argument that there were "policy reasons for not giving defendants the chance to wiggle off the hook because of Speedy Trial Act dismissals" with the observation, "[t]hat may be so . . . [b]ut we are not in the business

of drafting statutes. This task we leave to Congress." 810 F.2d, at 913. Thus, the *Peloquin* Court reached its result not because of any perceived unfairness to the defendants of a contrary result or diminution of their "rights" under § 3282,[11] but because that court felt constrained by the language of § 3282. In asking the court below to sustain its position in the case at bar, the Executive Branch has effectively asked the Judiciary to allow it to draft and unilaterally enact a statute under which exceptions to § 3282 will be allowed. Indeed, the Government has gone even further and said that it and individual targets of its investigations may enact such "statutes" on an *ad hoc* basis as they see fit, thereby putting in place a totally unregulated system of what the Government is content to view as "voluntary" waivers of § 3282.

Standing in sharp contrast to this system is the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, which, of course, fulfills at the post-indictment stage of a prosecution public policies similar to those furthered by statutes of limitations at the pre-indictment stage. In that Act, Congress carefully established a detailed set of "exceptions" to the Act's requirements that cases go to trial soon after indictment. That Act expressly permits "waiver" of its provisions by agree-

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[11] In the court below, the Government purported to distinguish *Peloquin* on the ground that that case involved a unilateral effort of the Government to extend the five-year limitation imposed by § 3282. The opinion in *Peloquin*, however, does not suggest that the unilateral nature of the extension at issue was regarded by the Ninth Circuit as relevant, let alone dispositive, of the Government's position. What *Peloquin* says is that exceptions to § 3282 cannot be inferred by the courts—they must be legislated by Congress.

ment between the Government and the defendant only "pursuant to a written agreement . . . with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). Indeed, the courts have refused to recognize the validity of written waivers of the Speedy Trial Act not expressly authorized by § 3161(h)(2). In *United States* v. *Ray*, 768 F.2d 991 (8th Cir. 1985), the question was whether a continuance, based upon a provision of the Speedy Trial Act authorizing delay of a trial upon the grant of a continuance by the trial judge *sua sponte* or at the request of the Government or the defendant, met the statutory requirement that the "ends of justice served by taking such action outweigh the best interest *of the public* and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A) (emphasis added). The Government argued to the Eighth Circuit that no such finding was required because the defendant had "waived" his rights under the Speedy Trial Act. That court, however, held that such a waiver could not substitute for the substantive requirements of § 3161(h)(8)(A). 768 F.2d, at 998 & n.11. *See United States* v. *Dickie*, 775 F.2d 607, 610 (5th Cir. 1985) ("defendant's willingness to waive [Speedy Trial Act] right . . . does not alter a court's duty to consider the prompt administration of justice as a factor.")

Cases such as *Ray* and *Dickie* are instructive in two respects. First, they recognize that the important *public* policies furthered by the Speedy Trial Act are not subject to even the most "voluntary" waiver by the Government and a defendant. Second, they illustrate, as does the Speedy Trial Act itself, the complexity of the issues posed by securing society's

interest in the prompt, effective administration of criminal justice. These issues are consumately not suited for resolution in bartering between the Government and the targets of its investigative and prosecutorial efforts or by the courts in trying, after the fact, to discern good "waivers" from bad "waivers." They are, as stated by Judge Kennedy in *Peloquin*, grit for the legislative mill. This is especially true because the plain language of § 3282 speaks broadly to this issue and declares that if there are to be exceptions to the statute of limitations, it is to Congress—not the Executive Branch, targets and the courts—to provide for those exceptions by legislation enacted pursuant to Art. I, § 7 of the Constitution.

2. *The Practice in Question Is Widespread*

The questions presented by this case are recurring ones. The District Court in this case inquired of the Government as to the nature of the controls, if any, that might be in place to govern the Government's initiation of or participation in such arrangements. The Government's response led the court to conclude:

> I am told that there is no control in the U.S. Attorney's Office on this. I don't mean to say things are out of control. It is just something that is not managed. Apparently, there are no criteria. . . . Nobody knows how many such cases there are.

App. B, *infra*, 12a. The reported cases confirm that this practice is of long standing, dating from at least the late 1950s, *see Benes* v. *United States*, 276 F.2d 99 (6th Cir. 1960), and that it is also geographically widespread, especially in complex "white collar" criminal cases. *See, e.g., United States* v. *Meeker*, 701 F.2d

685 (7th Cir.), *cert. denied*, 464 U.S. 826 (1983); *United States* v. *Levine*, 658 F.2d 113 (3d Cir. 1981); *United States* v. *Wild*, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977); *United States* v. *Del Percio*, 657 F. Supp. 849 (W.D. Mich. 1987), *appeal pending*, No. 87-1396 (6th Cir.); *United States* v. *Sindona*, 473 F. Supp. 764 (S.D.N.Y. 1979). Petitioner has no reason to believe that these reported cases are anything more than the tip of an iceberg, and the record in this case certainly suggests as much.[12]

3. *There Is an Inter-circuit Conflict on This Issue*

The Courts of Appeals are divided on this issue both as to analysis and result. In *Waters* v. *United States*, 328 F.2d 739, 742-43 (10th Cir. 1964), the defendant raised for the first time on appeal the question whether his conviction after trial could stand because the information against him was filed after the applicable statute of limitations, 26 U.S.C. § 6531, had run. The Tenth Circuit, holding that § 6531 was "plainly a limitation on the power to prosecute or punish," held that failure of the defendant to raise this issue did not constitute a "waiver" and that § 6531 was therefore to be viewed as "jurisdictional."

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[12] Because, as discussed *supra*, the Government was unable or unwilling to document in the District Court the pervasiveness with which open-ended (or determinate) arrangements were being sought or had been entered by the Office of the United States Attorney for the Central District of California, petitioner must necessarily speculate regarding the extent to which such arrangements may be in force in that District, let alone the other Districts in the federal system. Petitioner trusts that the Solicitor General, in responding to this petition, will be willing to provide this Court with a more detailed account of the scope of the use of both indefinite and definite arrangements by federal prosecutors.

The Tenth Circuit's reasoning and result[13] are flatly contrary to the reasoning and result reached in *United States* v. *Akmakjian*, *supra*, upon which the Ninth Circuit in this case squarely based its rejection of petitioner's position regarding § 3282.[14] Thus, the de-

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[13] The Government has elsewhere argued that the decision in *Waters* no longer represents the Tenth Circuit's position based upon that court's recent decision in *United States* v. *Gallup*, 812 F.2d 1271 (10th Cir. 1987). That argument is meritless. In *Gallup*, the defendant argued that there was insufficient evidence that any overt act in furtherance of the charged conspiracy had taken place during the five-year limitations period and that, therefore, conviction on the conspiracy count was time-barred. The Government responded to that essentially fact-bound assertion by arguing, in the alternative, that the last three overt acts charged were within the five-year limitations period and that the defendant had "waived" that defense by failing to raise it prior to the verdict. The defendant did not even brief the "waiver" issue, nor did the Government, in raising the "waiver" issue in its brief, cite to or otherwise suggest the relevance of *Waters* to its argument. (Ten copies of the pertinent portions of the briefs of the parties have been lodged with the Clerk of this Court simultaneously with the filing of this Petition.) The Tenth Circuit, without citing *Waters*, pointed out that the defendant had not sought an instruction on the statute of limitations, implying that the defendant had thereby deprived the jury of the opportunity to determine the facts necessary to establish his limitations defense. (In contrast, the limitations defense advanced in *Waters* did not depend upon any factual determinations. 328 F.2d, at 743-44.) The court went on to state that the limitations defense, because not raised at trial, "need not [be] consider[ed] on its merits," and that the evidence supported the Government's argument that the conspiracy charge was not time-barred. 812 F.2d, at 1280. The Tenth Circuit's decision in *Gallup* therefore cannot be viewed as having disturbed its prior decision in *Waters*.

[14] As discussed in the text *supra*, the question whether a bilateral arrangement between the Government and a target of a

cisions in *Waters* and the case at bar are in conflict assuming, *arguendo*, that the Government is correct in its view that cases such as *Akmakjian* are relevant to the legal questions in this case.

Also in conflict with the decision below is *Benes* v. *United States*, 276 F.2d 99 (6th Cir. 1960). In *Benes*, the Government and the defendant had entered into several agreements the object of which was to suspend the running of a statute of limitations applicable to criminal tax prosecutions. In rejecting the Government's argument that the statute of limitations could be "waived" by such an arrangement, the Sixth Circuit squarely held that "such voluntary action does not toll the statute of limitations in a criminal prosecution." *Id.*, at 109. On this basis, and this basis alone, the Sixth Circuit ordered reversal of the defendant's conviction and dismissal of the time-barred count of the indictment that had led to conviction. In *United States* v. *Del Percio*, 657 F. Supp. 849 (W.D. Mich. 1987), the court recently followed and applied *Benes* to dismiss indictments returned during a period in which the defendants had purportedly "waived" § 3282 for a limited period of time by their execution of a series of three arrangements

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criminal investigation to suspend the running of a statute of limitations, on the one hand, and the question whether a defendant may, as in *Waters* and *Akmakjian*, assert a statute of limitations as a bar to conviction after trial on, respectively, either direct appeal or collateral proceedings, are very different questions. There is no doubt, however, that the adoption by the court below of the reasoning of *Akmakjian* places its decision in direct conflict with the decision in *Waters*. Furthermore, the Government relied on *Akmakjian* as dispositive of Ninth Circuit law in this case below and recognized that *Akmakjian* was analytically irreconcilable with *Waters*.

with the Government. In its opinion, the *Del Percio* court emphasized the broad, public purposes of § 3282, stating that § 3282

> requires that the government vigorously investigate those cases which it chooses or hopes to prosecute, and restrains it from putting to an accused individual an oppressive choice: whether "to agree" to a waiver because the government suggests that if it is afforded more time to investigate it might decide not to indict, or to refuse and run the risk of being unfairly charged by a government prosecutor trying to beat the statute of limitations.

657 F. Supp., at 859-60.

The Government acknowledged in this case below that *Benes* and *Del Percio* were contrary to its position. On appeal to the Sixth Circuit in *Del Percio*, the Government, as it had done in this case, briefed the case as involving only the question whether a defendant could "waive" his or her "rights" under § 3282.[15] Because only a few courts, including the Ninth Circuit in *United States* v. *Peloquin*, *supra*, and,

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[15] Indeed, the Government's opening brief in the Sixth Circuit contains but a single citation to § 3282 and, as the Government's opening brief in this case below, does not even quote the language of § 3282. *See* Br. for United States, at 11, in *United States* v. *Del Percio*, No. 87-1396 (6th Cir.). (Ten copies of the Government's brief in *Del Percio* have been lodged with the Clerk of this Court simultaneously with the filing of this Petition.) The Government did not file a reply brief in *Del Percio*. The Government has yet to file a brief in any court which makes a serious attempt to explain how the language of § 3282 can be read to authorize the repeal of § 3282 by arrangements such as the one in the case at bar.

to a certain extent, the District Court in *Del Percio*, have analyzed the validity of purported exceptions to § 3282's mandatory language as, at the very least, beginning with the language of that statute, the conflicts among the Courts of Appeals are overlaid with some analytic confusion. There is, however, square conflict as to result and, petitioner respectfully submits, an urgent need for this Court to resolve not only that conflict but to clarify the appropriate framework for analyzing such non-statutory "exceptions" to federal criminal statutes of limitations.

B. The Questions Whether and Under What Circumstances a Bi-lateral Arrangement to Suspend the Statute of Limitations Indefinitely or for a Finite Period of Time Is Authorized Are Important Questions upon which the Courts of Appeals are Divided and upon which this Court's Decision is Needed

If, contrary to petitioner's primary submission above, the Court were to determine that the plain language of § 3282 does not preclude bi-lateral arrangements to suspend the five-year limitations period in the absence of a statute authorizing such suspension, the question would be reached whether such an arrangement unlimited in time may be enforced against a defendant over his pre-trial objection in the total absence of any showing by the Government of a particularized need for such an open-ended suspension.

The District Court held in this case that the absence of any justification offered by the Government for this open-ended arrangement rendered it invalid. On appeal, the Ninth Circuit refused to recognize a distinction between arrangements providing for definite and indefinite extensions and fashioned a rule under

which either type of arrangement would be invalidated only if the delay in indictment occasioned by such an arrangement was "unreasonable" or if the Government had acted in "bad faith" in pursuing such an arrangement. This holding reversed the determination of the District Court that such an arrangement had to be reasonably tailored to the circumstances of each particular case.

Because the Government took the position below that it essentially did not have to justify its participation in such open-ended arrangements either as of the time such arrangements were entered or thereafter, the Government may or may not accept the Ninth Circuit's decision regarding the circumstances under which such arrangements may be held invalid.[16] However that may be, the proposition that such arrangements may be entered in a single case, and

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[16] In the court below, the Government seemed to take the position that dismissal of an indictment in connection with an open-ended (or a determinate) arrangement to suspend the five-year limitation period of § 3282 would be appropriate only if the delay in indictment rose to the level of violating the defendant's constitutional rights under the Due Process Clause, relying on *United States* v. *Marion*, 404 U.S. 307, 322-24 (1971). The Government's position below in this regard is certainly ironic given that the Solicitor General argued to this Court in *Marion* that the Sixth Amendment should not generally be extended to protect defendants against pre-indictment delay because federal defendants enjoy the protection of Congress's decision that indictments shall not be returned more than five years after commission of the offense charged. *See* Br. for the United States, at 22-27, in *United States* v. *Marion*. In *Marion*, this Court accepted the Solicitor General's submission on this point, stating that use of the Sixth Amendment to police pre-indictment delays was unnecessary because "statutes of limitation already perform that function." 404 U.S., at 323.

therefore presumptively all cases investigated by the Government, for an *unlimited* period of time subject only to the gentle restraint that indictment not be delayed "unreasonably" and that the Government not act in "bad faith" is breathtaking. It is also a radical departure from the common view of statutes of limitations shared since the beginning of the Nation. In rejecting an argument that Congress had failed to provide for any limitation on the bringing of actions under a federal statute providing for the imposition of monetary penalties, Chief Justice Marshall, writing for the Court in 1805, pointed out that allowance of the bringing of such actions "at any point in time . . . . would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 335, 337 (1805).

Petitioner will contend on the merits that the difference between an open-ended arrangement and an arrangement fixed as to time is a difference in kind as well as degree. There is, most respectfully, no plausible basis upon which to assert that *any* Congress has ever determined to leave such a significant suspension of the manner in which the criminal justice system functions to *ad hoc*, unguided and judicially unsupervised arrangements between the Executive Branch and private persons. As noted above, *see* note 7, *supra*, when Congress has created statutory exceptions to § 3282's five-year limitation period, it has been careful to place limits on the total allowable extensions that may be permitted where such limits were appropriate. *See* 18 U.S.C. § 3292. Given Congress's attention to detail on these matters, it is utterly implausible that Congress would authorize arrangements such as that involved in this case. This

may explain the Government's reluctance to acknowledge that these are matters for the Legislative Branch, but it does not justify the Government's asserted power to displace the constitutional role of Congress in such matters that was expressly preserved by Congress in the exceptions clause of § 3282.

If this Court were to hold, notwithstanding the plain language of § 3282 read in context with § 3292, that Congress intended to permit open-ended suspensions of § 3282 such as occurred in this case, the necessity of articulating ground rules for the implementation of a system of determinate and indeterminate "waivers" would be manifest. As noted above, the Ninth Circuit held in this case that there need be no specific basis for such arrangements, which will be struck down in that Circuit only if the *result* of such an arrangement is to delay unreasonably an indictment or if the target can subsequently demonstrate that the Government had acted in "bad faith" in entering the arrangement. The Ninth Circuit's approach to the validity of such arrangements in this case conflicts with that of the D.C. Circuit. In *United States* v. *Wild*, 551 F. 2d 418 (D.C. Cir.), *cert. denied*, 431 U.S 916 (1977), the D.C. Circuit upheld an open-ended "waiver" of a criminal statute of limitations because, although open-ended, that "waiver" was tied to the express purpose of permitting the defendant to pursue plea bargaining negotiations with the Government. *Id.*, at 425. There, the "waiver" was upheld because the defendant "was prosecuted within a reasonable length of time" and demonstrated "no prejudice resulting from the delay" in that prosecution. *Id.* Thus, in the Ninth Circuit a "waiver" is valid if delay in indictment is not "unreasonable" and the

Government is not shown to have acted in "bad faith," while in the D.C. Circuit delay in prosecution must not be unreasonable and the defendant must in any event demonstrate "prejudice" from any delay in prosecution.

In contrast with both this case and *Wild*, in *United States* v. *Meeker*, 701 F. 2d 685 (7th Cir. 1985), *cert. denied*, 464 U.S. 826 (1983), the Seventh Circuit sustained the validity of consecutive "waivers" totalling about two months with the broad holding that, "[t]he purposes of a time bar are not offended by a knowing and voluntary waiver of the defense by the defendant." *Id.*, at 688 (footnote omitted). Under that broad holding, "waivers" would appear to be unassailable in the Seventh Circuit on any basis. This same approach appears to have been followed by the United States District Court for the Southern District of New York in *United States* v. *Sindona*, 473 F. Supp. 764, 766 (1979), in which that court upheld a series of thirteen determinate "waivers" based upon the "broad proposition that a deliberate and intentional waiver of the statute of limitations, when a defendant is advised by counsel, is valid and effective." Indeed, *Meeker* and *Sindona* appear to hold that a target, having "waived" his or her rights under a criminal statute of limitations, retains no residual statutory or constitutional rights that he or she might otherwise subsequently assert to invalidate such a "waiver." The Government's position on these issues in the courts below in this case was at best unclear. *See* note 16, *supra*.

Given the diversity in the foregoing approaches to the circumstances under which these arrangements will be found to be invalid in particular cases and

their apparently widespread, unregulated use, there is an urgent need for the Court to formulate in this case a body of rules for the administration of this component of the federal criminal justice system if the Court holds, contrary to petitioner's arguments, that such arrangements are generally authorized by § 3282.

CONCLUSION

In *United States* v. *Marion*, this Court observed that statutes of limitation such as § 3282 "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced" by pre-indictment delay. 404 U.S. 307, 322 (1971). Faced with imminent indictment, it is difficult to imagine a defendant who would not enter an arrangement to nullify § 3282.[17]

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[17] As the court observed in *United States* v. *Del Percio*, "[t]he coercive power of the government is too great to allow it to assume" the leveraged position it has in every criminal case in which the threat to indict may reasonably be expected to force even the most innocent target of a federal investigation to propose or accept such an arrangement. 657 F. Supp., at 860. Congress, not the Executive Branch, targets or the courts, should be the final judge of whether and to what extent the public's interest in speedy, efficient justice should be subordinated to the needs of the Government to "make its case" with additional time acceded to by targets whose "choice" in the matter is purely theoretical. At no point in the criminal process is the power of a prosecutor greater and, therefore, more subject to abuse, than that time at which the statute of limitations is about to expire. The prosecutor, as in this case, may threaten indictment. As observed in note 8, *supra*, a target in such circumstances has no available method of testing at that point, if ever, whether the case is indictable at that stage. To suggest that a target has a "choice" in such circumstances blinks reality.

Faced with a busy trial schedule or a need to improve his or her case, it is difficult to imagine a federal prosecutor who would not choose delay. The plain language of § 3282, however, imposes a discipline on both prosecutor and defendant because of the higher interest of the public in speedy, reliable and efficient justice. The petition should be granted and the Court should hold that § 3282 means what it so plainly says, thereby leaving for the Legislative Branch the task of measuring and resolving the complexities and competing interests at stake each time the criminal statute of limitations is suspended.

December 15, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-5037

D.C. No. CR-87-0736-JMI

United States of America,
Plaintiff-Appellant,

v.

Craig E. Caldwell,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Columbia
James M. Ideman, District Judge, Presiding

Argued and Submitted
September 14, 1988—Pasadena, California

Filed October 20, 1988

Before: William A. Norris, Cynthia Holcomb Hall and Alex Kozinski, Circuit Judges.

Opinion by Judge Norris

OPINION

NORRIS, Circuit Judge:

In *United States v. Akmakjian*, 647 F.2d 12, 14 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981), we held that the five-year statute of limitations codified at 18 U.S.C. § 3282 was not jurisdictional and could be waived by a defendant. We are now called upon to decide whether a written agreement providing for an indefinite extension of the limitation

period is valid and enforceable. The district court, after noting that such open-ended waivers undermine the policy concerns which animate the statute of limitations, held that such waivers could only be upheld if the government could justify their use by demonstrating extraordinary circumstances. Finding no extraordinary circumstances in this case, the district court granted defendant Craig Caldwell's motion to dismiss the indictment against him as time-barred, notwithstanding that the open-ended waiver was executed by Caldwell through his attorney. Because we find no basis for distinguishing between limited-term and open-ended waivers, we reverse the district court's dismissal of the indictment.[1]

The district court, in requiring the government to demonstrate extraordinary circumstances to justify the open-ended waiver, fashioned a rule of law which is subject to *de novo* review. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

The government argues that the district court erred in subjecting open-ended waivers to a heightened level of judicial scrutiny. The government insists that as long as an indictment is brought within a reasonable period of time after a waiver, the waiver should be valid if it was executed knowingly and voluntarily. Caldwell, on the other hand, argues that the district court was not skeptical enough of open-ended waivers. He argues that if the public policy objectives which underlie the statute of limitations are to be served, courts should *never* uphold open-ended waivers.

We believe the government clearly has the better of this argument. At the outset, it bears repeating that our court

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[1] The district court refused to enforce Caldwell's waiver of the statute of limitations solely on the ground that it was open-ended. The district court did not find, and indeed Caldwell does not argue, that the government in fact delayed an unreasonable period of time before returning an indictment. As a result, that issue is not before us for decision.

has held explicitly that the statute of limitations is not jurisdictional and can be waived. *Akmakjian*. Thus, unless other lines of caselaw or public policy concerns compel a different result, the standard for acceptance of a waiver of the statute of limitations should be the same as the standard in other waiver contexts, *i.e.*, whether the waiver was knowing and voluntary. This standard was applied by the District of Columbia Circuit when it was confronted with a similar open-ended waiver of the statute of limitations:

> "Constitutional rights which the defendant may waive include, *inter alia*, the right to be represented by counsel, the right not to be twice put in jeopardy, and the right to be tried in the district where the offense was committed. If the strong policies behind these rights are not violated by a rule permitting them to be waived by defendant, we cannot find that the limitation statute's policy is violated here where the defendant was fully cognizant of the consequences of such a waiver and decided to execute it on the advice of his attorney for his own benefit." *United States v. Wild*, 551 F.2d, 418, 424-25 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977) (citations omitted).

We find the *Wild* reasoning convincing. Nor has Caldwell directed us to any caselaw which looks the other way.

Caldwell points to a number of cases which strictly interpret the language of section 3282, which provides that the limitation period of five years is not to be extended "except as otherwise expressly provided by law." *See, e.g.*, *United States v. Peloquin*, 810 F.2d 911 (9th Cir. 1987); *United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1592 (1988). Caldwell places great reliance on this statutory language and these cases, arguing that they evince a Congressional intent to preclude

any waiver of the statute of limitations. If Caldwell's reading of the statute were accepted, however, the rule in this circuit that the statute of limitations is not jurisdictional and can be waived in some circumstances, *see Akmakjian*, would be called into question. Moreover, the cases Caldwell relies upon do not involve *waivers*. Instead, they involve unilateral efforts by the government to extend the limitation period beyond five years.[2] It is unsurprising that courts have permitted such unilateral extensions only if they are expressly provided for in the statute. By contrast, the extension agreement at issue here was bilateral. Indeed, it was sought by Caldwell and prepared by Caldwell's attorney.

Nor are Caldwell's policy arguments any more persuasive. He identifies a number of policy concerns served by the statute of limitations, and tries to demonstrate that these concerns are undermined by open-ended waivers. All of his policy arguments are flawed, however, in that they fail to distinguish between open-ended waivers and other types of waivers.

The first policy concern behind the statute of limitations Caldwell identifies is that of avoiding trials based upon stale evidence. As the district court recognized, the preference against the use of stale evidence furthers the values of judicial economy and convenience as well as the interests of individual defendants. What the district court failed to recognize, however, is that there is no basis for distinguishing between limited waivers and open-ended waivers when it comes to stale evidence. A long-term waiver with a fixed expiration date can lead to the use of stale evidence just as easily as an open-ended waiver. The real question

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[2] The only case Caldwell cites in which a *waiver* was not upheld is *United States v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955), *aff'd*, 237 F.2d 274 (8th Cir. 1956). In *Harris*, however, the court held that the statute of limitations is jurisdictional, a position that has been explicitly rejected by this circuit. *See Akmakjian*.

in each case is whether the evidence was in fact stale because the prosecutor waited an unreasonably long period of time before returning the indictment.

A second public policy concern animating the statute of limitations relates to the incentive the statute creates for prompt law enforcement. The Supreme Court has noted that statutes of limitation "may . . . have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 115 (1970). Open-ended waivers of statutes of limitation, Caldwell argues, reduce this incentive because they allow the prosecutor to buy time with which he can accomplish investigation he should have accomplished earlier. Once more, however, Caldwell's logic would call into question *all* waivers, because *all* waivers potentially enable the prosecutor to "buy time."[3] As we have indicated a number of times already, this circuit has already held that the statute of limitations is waivable. *See Akmakjian*.[4]

In sum, we believe that neither caselaw nor public policy concerns warrant special treatment of open-ended waivers. None of Caldwell's arguments effectively distinguish open-

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[3] Moreover, this "salutary effect" is just that; spurring law enforcement officials is not the primary objective of the statute of limitations, and the Supreme Court has never suggested otherwise. Indeed, the dicta in *Toussie* quoted above appears after a passage in which the Court notes that "[t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time. . . . to protect individuals. . . ." 397 U.S. at 114.

[4] It is not an adequate response to say, as Caldwell's counsel did at oral argument, that limited-term waivers serve the defendant's interests whereas open-ended waivers do not. Indeed, it was Caldwell's attorney who first suggested and then prepared the open-ended waiver at issue here after two earlier fixed-term waivers had expired. It is readily apparent from the record that Caldwell and his attorney believed that all three waivers served Caldwell's interests by giving him time to try to dissuade the prosecutor from indicting.

ended waivers from those of limited duration; indeed, Caldwell's attorney seemed to acknowledge this at oral argument when he shifted to the extreme position that all waivers are invalid—a position contrary to the law of this circuit. Unpersuaded by Caldwell's arguments, we hold that the district court erred as a matter of law in subjecting the open-ended waiver at issue in this case to an "extraordinary circumstances" test. Instead, the proper standard by which to judge the validity of open-ended waivers is whether they are entered into knowingly and voluntarily. *See Wild.* In this case, Caldwell does not, and indeed could not, argue on this record that he did not agree to the waiver knowingly and voluntarily.

In spite of this, Caldwell argues—and the district court seemed to agree—that this particular waiver should not be enforced because the government improved its case against Caldwell during the period of time the waiver was in effect. We also find this reasoning unconvincing.[5] It is neither remarkable nor troubling that a waiver of the statute of limitations, whether for a fixed or indefinite period of time, provides the prosecutor with an opportunity for further investigation or to resolve calendar conflicts. Surely, the prosecutor is not expected to sit on his hands when a target of an investigation knowingly and voluntarily agrees to extend the statutory period for indictment. What the prosecutor may not do, of course, is unnecessarily delay an indictment during the additional time period. Here Caldwell does not claim that the indictment was unnecessarily delayed after the waiver or that the prosecutor acted in bad faith in agreeing to the waiver. Nor does he suggest

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[5] In explaining its dismissal of the indictment, the district court also noted that the government did not seek prior judicial approval of Caldwell's waiver. Caldwell believes that this lack of prior judicial approval was *not* central to the district court's analysis and does not argue on appeal that prior judicial review is required. Brief of Appellee at 43. Accordingly, we need not address this question.

that the government was not ready to indict Caldwell at the time the waiver was signed.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CR-87-0736-JMI

UNITED STATES OF AMERICA,

PLAINTIFF,

V.

CRAIG E. CALDWELL,

DEFENDANT.

THE HONORABLE JAMES M. IDEMAN, PRESIDING UNITED STATES DISTRICT COURT JUDGE

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

MONDAY, JANUARY 11, 1988

LOS ANGELES, CALIFORNIA

* * * * * * *

BUT MY REASONS ARE AS FOLLOWS FOR RULING THE WAY THAT I WILL. I WILL SUMMARIZE THEM AS FOLLOWS: THE GOVERNMENT BROUGHT THIS CASE TO TRIAL AND THE DEFENSE MADE A MOTION TO DISMISS ON THE GROUNDS THAT THE STATUTE OF LIMITATIONS HAD BEEN EXCEEDED. AND THAT IS TRUE: THE STATUTE OF LIMITATIONS HAD BEEN EXCEEDED BY OVER ONE YEAR.

THE GOVERNMENT DEFENDED AGAINST THAT MOTION BY STATING THAT IT HAD A WAIVER

FROM THE DEFENDANT AND HIS COUNSEL, AND SIGNED BY THE GOVERNMENT WHICH IT WANTED THIS COURT TO HONOR, INDEFINITELY—AND I EMPHASIZE "INDEFINITELY"—WAIVING THE STATUTE OF LIMITATIONS. I AM NOT GOING TO CONSIDER THE MANNER IN WHICH THE CASE WAS TREATED IN THE PROSECUTOR'S OFFICE. I DO NOTE THAT IT WAS SOME YEARS IN THE PROSECUTOR'S OFFICE BEFORE THE CASE WAS READY FOR INDICTMENT. AND WHEN THE PROBLEMS AROSE IN THE SUMMER OF 1986, THE DATES WERE UPON YOU.

I FULLY REALIZE THAT THE DEFENDANT WAS INTERESTED IN DISCUSSING THE CASE, AND WAS SEEKING EXTENSIONS; BUT NEVERTHELESS, I FEEL THAT IT IS THE GOVERNMENT'S DUTY TO RESIST THOSE INAPPROPRIATE CASES.

I AM NOT TROUBLED BY THE FIRST WAIVER. THE FIRST WAIVER, AT LEAST, WAS FOR A TIME CERTAIN. THE SECOND PERIOD OF WAIVER WAS AN UNCERTAIN CREATURE. I AM NOT GOING TO TRY TO CHARACTERIZE WHAT IT WAS; BUT THE DEFENSE THOUGHT IT WAS AN INDEFINITE WAIVER. THE GOVERNMENT HAD ITS DOUBTS AND THERE IS NO QUESTION THAT THE GOVERNMENT GOT ACROSS TO THE DEFENSE THAT IT WANTED A BETTER WRITING THAN THEY HAD HAD BECAUSE THE GOVERNMENT WAS UNCERTAIN AS TO THE TERMS OF THE WAIVER.

ANYWAY, THE DOCUMENT WHICH WAS PREPARED BY THE DEFENSE—THE FINAL DOCUMENT—WAS WITHOUT QUESTION AN INDEFINITE WAIVER OF THE STATUTE OF LIMITATIONS FOR ALL TIME. THERE IS NOTHING IN THERE INDICATING THAT THERE IS EVER AN OBLIGATION

UPON THE GOVERNMENT TO BRING THE DEFENDANT TO TRIAL AT ANY PARTICULAR TIME.

THE STATED REASON FOR THE INDEFINITE WAIVER WAS THAT THERE WERE FURTHER DISCUSSIONS TO BE HAD BETWEEN DEFENDANT, COUNSEL, AND THE GOVERNMENT; AND PERHAPS SOME PEOPLE TO BE INTERVIEWED. BUT THERE HAS BEEN NO SHOWING THAT THERE WAS ANY EXTRAORDINARY CIRCUMSTANCE WHICH WOULD HAVE REQUIRED AN INDEFINITE WAIVER, SUCH AS WITNESS THAT COULD NOT BE FOUND AND HAD TO BE LOCATED AND SOME OF THE EXCEPTIONAL THINGS THAT ONE MIGHT THINK OF. THEREFORE, I DON'T SEE ANY REASON WHY THE WAIVER COULD NOT HAVE BEEN LIMITED TO A DATE CERTAIN.

I ALSO NOTE THAT THE COURT WAS NOT CONSULTED ON THIS WAIVER. IT WAS ASSUMED THAT THE COURT WOULD AUTOMATICALLY APPROVE THIS WAIVER—PERHAPS RUBBER STAMP IT OR WHATEVER YOU WANT TO SAY—BUT NO GUIDANCE WAS SOUGHT BY THE COURT. I WILL SAY AGAIN THAT WE HAVE A CRIMINAL DUTY JUDGE AVAILABLE EVERY DAY OF THE WEEK TO ASSIST COUNSEL IN ALL TYPES OF MATTERS THAT MAY BE APPROPRIATE INCLUDING MANY TYPES OF PRE-INDICTMENT MATTERS—CERTAIN WARRANTS, WIRETAPS, GRAND JURY PROBLEMS, AND SO FORTH. ALTHOUGH I REALIZE THAT THERE WAS NO STATUTE OR THERE IS NO WRITTEN PROCEDURE FOR CONSULTING THE COURT ON THIS TYPE OF MATTER, NEITHER IS THERE ANY PRECEDENT—EXCEPT FOR ONE OR TWO CASES IN OTHER CIRCUITS—AUTHORIZING THE TYPE OF WAIVER THAT WAS ENTERED INTO HERE.

SO IF MY SUGGESTION THAT YOU CONTACT THE COURT IS BREAKING NEW GROUND, REALLY, SO IS THIS CONCEPT OF WAIVERS ENTERED INTO WITHOUT THE APPROVAL OF THE COURT.

I DO NOTE, AS I SAID EARLIER, THAT OTHER WAIVERS INVOLVING WAIVERS OF THE RIGHTS OF DEFENDANTS WOULD NOT BE ACCEPTED WITHOUT COURT APPROVAL. IF THE DEFENDANT HAD AGREED OUT OF COURT TO PLEAD GUILTY, TO WAIVE A DEFENSE, NOT TO CALL WITNESSES, NOT TO CROSS-EXAMINE, I AM SURE THAT HE COULD CHANGE HIS MIND IN COURT AND IT WOULD NOT BE EXPECTED THAT THE COURT WOULD ENFORCE THAT.

I REALIZE THAT THOSE INVOLVE WAIVERS OF CONSTITUTIONAL RIGHTS, AND THIS IS A STATUTORY RIGHT; BUT I AM NOT SURE THAT THAT IS ENOUGH OF A DISTINCTION TO MATTER.

ONE OF THE PROPHYLACTIC THINGS THAT THE COURT COULD HAVE DONE, IF ASKED FOR PARTICIPATION IN THE WAIVER OF THE STATUTE OF LIMITATIONS, IS TO REQUIRE THAT THE GOVERNMENT FILE UNDER SEAL ITS EVIDENCE AS OF THE TIME OF THE RUNNING OF THE STATUTE SO THE GOVERNMENT WOULD NOT BE SEEN AS HAVING USED THE TIME TO IMPROVE ITS CASE.

THE WAIVER OF THIS CASE, AS I SAY, FOR AN INDEFINITE PERIOD WHICH IS CONTRARY AS I SEE IT TO THE NEEDS OF THE PARTIES FOR THE EXPRESSED PURPOSE. THE SUBSEQUENT EVENTS CLEARLY INDICATE THAT THERE WAS OTHER AGENDAS, OTHER THAN THE MERE DESIRE TO CONTINUE THE INVESTIGATION OF THE CASE. I WANT TO EMPHASIZE THAT I AM NOT SUGGESTING ANY BAD FAITH, BUT I DO THINK THERE WERE OTHER AGENDAS.

THE GOVERNMENT WAS ABLE TO RESOLVE A CALENDAR CONFLICT BY TRYING THE OTHER DEFENDANT. THE OTHER DEFENDANT TURNED OVER AFTER HIS CONVICTION AND IS NOW GOING TO BE A WITNESS AGAINST THIS DEFENDANT. SO, IT APPEARS THAT THE GOVERNMENT HAS USED THE TIME TO BETTER ITS POSITION.

THERE WAS NO REAL DISCUSSION FOR 6 OR 7 MONTHS AFTER THE INDEFINITE WAIVER WAS EXECUTED. THERE WAS NO INDICTMENT FOR A PERIOD OF 13 MONTHS. AS I SAY, IT COULD HAVE BEEN 13 YEARS; AND WE WOULD BE BASICALLY IN THE SAME POSITION.

I DO THINK THAT THE COURT HAS AN OBLIGATION TO DO WHAT IT CAN TO PREVENT THE BRINGING FORWARD OF STALE CASES. ALTHOUGH THE STATUTE OF LIMITATIONS MAY BE PRIMARILY A STATUTE THAT PROTECTS THE RIGHTS OF THE DEFENDANT, THE COURT HAS CERTAIN INTERESTS IN IT TOO. ONE OF THOSE, OF COURSE, IS TO MAKE SURE THAT THE PROSECTUION OF CASES IS DONE IN AN EXPEDITIOUS MANNER AND ALSO TO PREVENT OLD CASES FROM BEING BROUGHT FORTH.

THIS CASE, AS OF THE TIME OF INDICTMENT, WAS SIX YEARS OLD. THERE IS NOT REASON WHY IT COULDN'T HAVE BEEN 7, OR 8 OR 10 YEARS. INDEED, I AM TOLD THAT THERE IS NO CONTROL IN THE U.S. ATTORNEY'S OFFICE ON THIS. I DON'T MEAN TO SAY THINGS ARE OUT OF CONTROL. IT IS JUST SOMETHING THAT IS NOT MANAGED. APPARENTLY, THERE ARE NO CRITERIA. NO ONE KNOWS—AT LEAST, PRESENT COUNSEL DOESN'T KNOW; AND SINCE SHE IS VERY CAPABLE, I ASSUME THAT THAT IS THE STATE OF AFFAIRS. NO-

BODY KNOWS HOW MANY SUCH CASES THERE ARE.

LOOKING AT IT FROM THE STANDPOINT OF THE ADMINISTRATION OF JUSTICE, IF WE START APPROVING THESE INDEFINITE WAIVERS, WHO KNOWS HOW MANY ARE GOING TO COME ALONG? THERE MAY BE ANOTHER 10, 20, 50, 100. WHO KNOWS HOW MANY ARE PENDING IN THE CENTRAL DISTRICT? INSTEAD OF GETTING CASES 6 YEARS OLD, WE MAY GET THEM 10 YEARS OLD AND 15 YEARS OLD. NOBODY KNOWS. I THINK IT IS AN AREA THAT REALLY SHOULD BE MORE TIGHTLY MANAGED BY THE PROSECUTOR'S OFFICE.

I HAVE TO RULE ONE WAY OR THE OTHER. AND I HAVE A 50-50 CHANCE OF BEING RIGHT OR WRONG IN THE CASE. BUT MY INSTINCTS TELL ME THAT I SHOULD NOT PERMIT THIS TYPE OF INDEFINITE WAIVER OF THE STATUTE OF LIMITATIONS FOR THE REASONS GIVEN HERE. THAT IS MY CORE REASON FOR GRANTING THE MOTION. I FEEL THAT AN INDEFINITE WAIVER OF THE STATUTE OF LIMITATIONS UNDER THE CIRCUMSTANCES PRESENTED HERE WAS UNREASONABLE.

IT WILL BE THE GOVERNMENT, OF COURSE, THAT HAS THE BURDEN OF PROOF OF CONVINCING THE COURT TO ACCEPT THE WAIVER; AND I FIND THAT THAT BURDEN HAS NOT BEEN MET IN THIS CASE. THE COURT, THEREFORE, ORDERS THE INDICTMENT DISMISSED.

* * * * * * *

APPENDIX C

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense —

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH E. SPANIOL, JR.
CLERK

(7)

No. 88-998

In the Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment on the ground that a written agreement providing for an indefinite extension of the statute of limitations was invalid.

On May 6, 1986, petitioner was advised that an indictment against him was to be presented to a grand jury in the United States District Court for the Central District of California on May 13, 1986, within the applicable statute of limitations. Thereafter, petitioner's attorney prepared a series of three waivers of the statute of limitations that petitioner signed. Petitioner waived the statute of limitations so that he would be afforded extra time to argue against the return of the indictment. The second and third waivers drafted by petitioner's attorney did not contain an expiration date. Subsequently, on September 9, 1987, petitioner was charged in an indictment with various crimes arising out of transactions of the Western National Bank, of which he was Chairman of the Board and majority shareholder.

On January 11, 1988, the district court dismissed the indictment on the ground that a waiver of the statute of limitations could not be open-ended but had to state expressly that it was only for a fixed period of time. Accordingly, the court ruled that the agreements providing for an indefinite extension of the statute of limitations were invalid. Pet. App. 8a-13a.

The court of appeals reversed (Pet. App. 1a-7a). Noting that the statute of limitations is not jurisdictional and can be waived, the court ruled that neither case law nor public policy warrants special treatment of open-ended waivers. The court of appeals concluded that the waiver in this case should be enforced because petitioner "does not claim that the indictment was unnecessarily delayed after the waiver or that the prosecutor acted in bad faith in agreeing to the waiver" (Pet. App. 6a).

Petitioner contends (Pet. 7-23) that the applicable statute of limitations, 18 U.S.C. 3282, precludes an agreement between the government and a defendant suspending the five-year limitations period. Petitioner also contends (Pet. 23-28) that an open-ended agreement may not be enforced in the absence of a showing of a particularized need for the open-ended suspension. Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the

court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1989

* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00054

Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

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CRAIG E. CALDWELL,

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UNITED STATES OF AMERICA,

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REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
1. INTRODUCTION	1
2. THE POSTURE OF THIS CASE MILITATES *For*, NOT AGAINST, REVIEW BY THE COURT NOW	1
3. THIS CASE PRESENTS A SERIOUS AND UNSETTLED QUESTION WHICH DEMANDS SPEEDY AND DEFINITIVE RESOLUTION BY THIS COURT	6

TABLE OF AUTHORITIES

CASES:	Page
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	4
Dombrowski v. *Eastland*, 387 U.S. 82 (1967)	6
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	6
United States v. *Del Percio*, No. 87-1396 (6th Cir.)(appeal pending)	7,8
United States v. *Marion*, 404 U.S. 307 (1971)	5
United States v. *Richardson*, 702 F.2d 1079 (D.C. Cir. 1983), *rev'd*, 468 U.S. 317 (1984)	4,5,6
CONSTITUTION:	
U.S. Const., Amend. V (Double Jeopardy Clause)	4
U.S. Const., Amend. VI	5
STATUTES:	
18 U.S.C. § 3282	*passim*

REPLY MEMORANDUM

1. Introduction

This case has *nothing* to do with petitioner's innocence or guilt. It has to do with whether Congress has authorized the widespread practice under which federal prosecutors and the targets of criminal investigations may, acting in concert, ignore the applicable statute of limitations even though the language of that statute plainly says that they may not do so. The Government contends in its Memorandum in Opposition ("Opp.") that the criminal justice system should await the resolution of this question until petitioner has been found guilty of the offenses for which he has been indicted. The question, however, is whether petitioner can be indicted, not whether the Government can procure a conviction. The Government should be required to address the merits of petitioner's argument and defend in this Court its remarkable theory, pressed below and in many other courts, that the language of the federal criminal statute of limitations is irrelevant to what the statute means.

2. The Posture of This Case Militates *For*, not Against, Review by the Court Now

In its Opposition, the Government pursues, albeit under a somewhat different guise, the same strategy it has pursued in every court in which a defendant has challenged the validity of a bi-lateral arrangement to suspend a criminal statute of limitations. That strategy is to avoid any pretense of trying to explain to any court how the exceptions clause of 18 U.S.C. § 3282 can possibly be interpreted to permit that practice in the total absence of a law authorizing that

practice. Instead of addressing the merits, the Government insists that this case should not be heard *at this time* because of what the Government characterizes as the "interlocutory" posture of the case. Opp., at 3 n.*.

This case is not, however, interlocutory in the eye of either petitioner or the law. Unless this petition is granted, petitioner will be stripped of the core protection afforded to all persons by criminal statutes of limitations—the statutory right *not to have to defend against* criminal charges that are facially barred by the limitation.

The Government's argument, simply put, is that this Court's resolution of petitioner's challenge should await the trial and his conviction, upon which he will be able once again to present his challenge to the validity of this widespread practice to this Court if his conviction is otherwise affirmed on appeal by the court below.[1] The Government, of course, automatically prevails if petitioner is acquitted, because his challenge to this practice would be mooted after he had been put through the very trial that he contends cannot legally go forward.

The Government does not suggest that the Court lacks the power to hear this case at this time. The question posed by the Government's position is

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[1] Because the Government presumptively intends to conduct petitioner's trial free from any reversible error, the opposition is necessarily based on the proposition that petitioner should be forced to stand trial on charges that are facially barred by the statute of limitations and either be acquitted—in which case his challenge is literally mooted, or be convicted, after which the Government would expect the Ninth Circuit to affirm that conviction summarily based upon its decision on this appeal.

whether the Court should exercise that power now. The Government's position provokes several questions. First, why would this Court, by denying certiorari, consciously place itself in the position where it can at some later date vindicate petitioner's right not to be haled into court at all only by reversing an otherwise valid conviction? Second, why should petitioner stand trial and endure a public conviction before this Court exercises its undoubted authority to declare that he should not even have been indicted, let alone subjected to a trial and a conviction? Third, and perhaps most importantly, why should this Court delay its consideration of the legality of a widespread practice going to the heart of the administration of the federal criminal justice system when there is no evident legal basis upon which to support that practice?

In a closely analogous context, then-Judge Scalia asked similar questions in stating his position that 28 U.S.C. § 1291 should be construed to authorize an appeal from a District Court's denial of a motion to dismiss an indictment on double jeopardy grounds. Responding to the contorted logic of the majority's contrary opinion, Judge Scalia observed, rhetorically:

> **I can understand why one might perform intellectual gymnastics of this sort to *avoid* the results which the majority opinion produces—but surely not to *achieve* them. Why would one, with malice aforethought, place appellate courts in the position where they can only vindicate constitutional rights by awaiting proof positive that the person they set free is guilty? Or why subject a defendant to a second trial and a public**

conviction before permitting appellate courts to pronounce that he should not have been tried twice?

United States v. *Richardson*, 702 F.2d 1079, 1089 (D.C. Cir. 1983) (Scalia, J., dissenting).

The force of Judge Scalia's logic was sustained when this Court granted review in *Richardson* and reversed the D.C. Circuit. *Richardson* v. *United States*, 468 U.S. 317 (1984). In his opinion for the Court, then-Justice Rehinquist recognized the "strong congressional policy embodied in § 1291 against interlocutory appeals in criminal cases," *id.*, at 320, but concluded that the claim in that case met the three-part test established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949),[2] because, as the Court had previously recognized, the defendant "contested the very power of the Government to bring a person to trial, and the right would be significantly impaired if review were deferred until after the trial." 468 U.S., at 320.

Although the issue in *Richardson* involved the power of courts of appeals to entertain interlocutory appeals in criminal cases involving double jeopardy claims, the policies identified by the Court as *requiring* the courts of appeals to entertain such claims speak directly to whether this Court should exercise

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[2] Under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), an order of a District Court that conclusively determines a disputed issue, resolves an important question completely separate from the merits of the case, and involves an important right that would be lost, probably irreparably, if review is delayed, is appealable under the so-called collateral order doctrine.

its discretionary jurisdiction to review this case at this time. Unlike the situation in *Richardson*, which was conceded by the Court to involve a claim that was not completely collateral to the merits of the prosecution, *id.* at 321, petitioner's claim has nothing whatsoever to do with the merits of the Government's case against him. Petitioner's claim involves a pure issue of statutory construction, not, as in *Richardson*, a claim that required the appellate court to canvass the record made at the defendant's first trial and thereby involve itself in a very real sense in the merits of the defendant's case.

Furthermore, while petitioner's right may not be as directly based upon the Constitution[3] as was the double jeopardy claim in *Richardson*, it is nevertheless—by any measure—a right of great importance not merely to petitioner but to every person whose conduct may come under the scrutiny of federal prosecutors. As characterized by the Government in the court below, petitioner's "right" under § 3282 "is first and foremost to protect the individual *from having to defend* against old claims . . . ." Br. for United States, at 15 (emphasis added). Under the Govern-

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[3] As petitioner points out in the Petition, at 24 n.16, the Government itself has taken the position in this Court that criminal statutes of limitations perform at the pre-indictment stage the same function of requiring that cases be brought to trial quickly as is performed by the Sixth Amendment at the post-indictment stage. As this Court's decision in *United States* v. *Marion*, 404 U.S. 307, 322-24 (1971), makes clear, adherence to statutes of limitations should make it unnecessary to constitutionalize this area of the law at the pre-indictment stage. The decision of the Ninth Circuit below in this case invites such constitutionalization by effectively discarding the statutory regime enacted by Congress to address this constantly recurring issue.

ment's own view of the right at stake, that right protects all potential defendants "not only from the consequences of litigation's results but also from the burden of defending themselves." *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979), *quoting Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967). Yet the Government now asks this Court, by postponing review, irreparably to strip petitioner of the very right he seeks to vindicate.[4] There is no warrant for the Government's position.

3. This Case Presents a Serious and Unsettled Question Which Demands Speedy and Definitive Resolution by this Court

As petitioner demonstrates in his Petition, the lower federal courts are in disarray not only with respect to whether the practice challenged in this case is legal but how the legality of the practice should be analyzed. There is certainly no point in sending petitioner back to the Ninth Circuit to relitigate this question,

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[4] The Government offers consolation to petitioner by asserting, Opp., at 2, that petitioner is "in precisely the same position he would have occupied if the district court had denied his motion to dismiss." The unarticulated premise of this statement is that the denial of petitioner's motion would not have been appealable. This case does not present that issue because petitioner convinced the district judge—himself a former career state prosecutor—that the statute of limitations imposed at least some measure of discipline on the prosecution of cases by the Government. As the discussion in the text above suggests, however, it is far from self-evident that a denial of petitioner's motion to dismiss his indictment would not have been appealable as a collateral order under this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984). Indeed, under the Government's own submission in *Richardson*, *see* Br. of United States, at 10, such a denial would manifestly be appealable unless the "right" asserted were held not to be "important."

which was decided against him by a court that believed itself bound by a prior Ninth Circuit case which, as petitioner argued below, essentially has nothing to do with the merits of his challenge. Given this confusion within the lower courts—confusion perpetuated by the Government's success in arguing that the language of § 3282 is essentially irrelevant to the inquiry—this question is not likely to go away.[5]

As importantly, this case, much more so than criminal cases such as *Richardson* and *Helstoski* in which the Court has recognized a right to appellate review notwithstanding their interlocutory posture, involves a widespread practice that may be occurring literally dozens of times per day. For all this Court has been told by the Government in its Opposition, federal prosecutors, and defendants with little choice in the matter, may have, in fact, rendered the federal statute of limitations a nullity. Petitioner submits that

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[5] As of the time of submission of this Reply Memorandum, the Sixth Circuit still had this issue under submission in a case argued to a panel of that court in December 1987. *United States* v. *Del Percio*, No. 87-1396. Were the Government's position to be rejected in that case, the Solicitor General would presumably seek review by this Court in a case which, as here, had not yet gone to trial.

the mere possibility that they may have done so, or could do so, demands review of this case in its present posture.[6]

January 18, 1989 Respectfully submitted,

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[6] Petitioner urges that the Government be requested by the Court to respond to this Petition on the merits and that the Court then consider this Petition or defer action on it until the Sixth Circuit issues its decision in *United States* v. *Del Percio*.

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 88-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CRAIG E. CALDWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF PETITIONER TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF PETITIONER TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

This petition is presently on the Conference List for the Court's February 17, 1989 Conference. Petitioner contends, *inter alia*, that the decision below conflicts with the decision of the Sixth Circuit in *Benes* v. *United States*, 276 F.2d 99, 109 (6th Cir. 1960), which held that voluntary action by a criminal defendant to suspend the running of the statute of limitations "does not toll the statute of limitations in a criminal prosecution." The Government has not denied the existence of this conflict in this Court, choosing to avoid that issue by declining to address the merits of this petition.

That a conflict with *Benes* presently exists is undeniable because *Benes* has been applied currently by a District Court in the Sixth Circuit to dismiss indictments based upon essentially the same arguments advanced by petitioner in this Court—that 18 U.S.C. § 3292 does not authorize bilateral arrangements between the Government and the targets of criminal investigations to suspend its limitation on prosecutions. *United States* v. *Del Percio*, 657 F. Supp. 849 (W.D. Mich. 1987). The Government appealed that decision to the Sixth Circuit, which heard oral argument in that appeal on December 7, 1987.

The failure of the Sixth Circuit to decide the *Del Percio* appeal in the more than fourteen months since that appeal was argued is additional evidence that *Benes* conflicts with the decision below and also indicates the substantiality of the questions presented by petitioner in this case. If the Sixth Circuit affirms the dismissal of the indictments in *Del Percio* as

barred by § 3282, it is almost inconceivable that the Solicitor General would not ask this Court to resolve these important questions either in the case at bar or in *Del Percio*.

The Ninth Circuit panel in this case, although it ruled unanimously against petitioner on the basis, in part, of prior precedent in that circuit, granted—and the Government did not oppose—petitioner's motion for stay of that court's mandate. The Government understood that that stay would remain in effect for a potentially lengthy period of time until this Court finally disposes of this case. Petitioner has no reason to believe that an additional delay in this Court's disposition of this petition would prejudice the Government's ability to take this case to trial.

Although petitioner believes that his petition should be granted regardless of the outcome of the Government's appeal in *Del Percio*, petitioner recognizes that the Court may want to assure itself of the Sixth Circuit's adherence to its prior decision in *Benes* prior to calling for a response on the merits from the Government and acting on this petition. Petitioner therefore respectfully moves the Court to defer consideration of his petition until such time as the Sixth Circuit has issued its decision in *Del Percio* and the Government and petitioner have had the opportunity to file briefs in this Court addressing the impact of the Sixth Circuit's decision on the question whether this petition should be granted.

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